IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, ET AL.,

Petitioners,

v.

STATE OF ILLINOIS, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

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MOTION OF MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to this Court's Rule 42, Mid-America Legal Foundation ("*Mid-America*") hereby moves the Court for leave to file the attached brief as *amicus curiae* in support of the

position of petitioners on the need to accommodate the federal common law of nuisance with the federal statutory and regulatory program for clean water.

Mid-America has an interest in the disposition of the case which is before this Court on a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit in *Illinois* v. *City of Milwaukee,* 599 F.2d 151 (7th Cir. 1979) based upon the expertise and purpose of this organization.

Mid-America was organized in 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation on matters of public interest at all levels of the judicial process. *Mid-America* takes special interest in questions of law of a national scope that originate in or have a direct effect on the mid-America region, namely, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. It has an interest in this case because the decision below interprets the Federal Water Pollution Control Act of 1972, PL 92-500, the Clean Water Act of 1977, PL 95-217 which amends the 1972 Act, and the federal common law of nuisance in a way which affects the interests of every state which shares a waterway with one or more states. By analogy, the implications of this decision extend beyond the question of interstate water pollution to include problems of air pollution, land use, safety and energy production.

Mid-America respectfully submits that its brief, lodged herewith, presents at least one analysis of a significant question of federal law and related authority which is not presented by the parties. It, therefore, believes that the question would not otherwise be presented, or at least adequately presented with related authority, although it could be dispositive of the issues in this case.

It is the view of *Mid-America* that the Court of Appeals improperly applied the federal common law of nuisance in the context of a comprehensive federal statutory program for water pollution control and that the decision below is in conflict with applicable decisions of this Court under the federal common law of public nuisance.

Mid-America has received the written consents of the State of Illinois and the City of Milwaukee, et al. Copies of these letters have been filed with the Clerk. Consent was refused by counsel for the State of Michigan, thereby necessitating this motion.

Mid-America respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE

INTEREST OF AMICUS

The interest of Mid-America Legal Foundation *("Mid-America")* as *amicus curiae* is stated briefly in the motion for leave to file this brief. It is appropriate to expand on that statement here.

Mid-America has an interest in this case because the decision below interprets the Federal Water Pollution Control Act of 1972, PL 92-500 ("FWPCA"), the Clean Water Act of 1977, PL 95-217, which amends the 1972 Act, and the federal common law of public nuisance in a way which affects the interests of every state which shares a waterway with one or more other states.

The ramifications of this decision, however, extend beyond the scope of an individual state's interest in water pollution to include potential problems of interstate land use, air pollution, safety and energy production premised on the federal common law of public nuisance, a heretofore limited and amorphous body of law.

The present case, involving allegations of interstate water pollution, is not singular and should not be considered in isolation. The geography of the nation itself would turn the variable standard applied by the district court and the court of appeals into a quagmire of judicial uncertainty. Every state which discharges sewage into a common waterway in compliance with federal legislative standards, nonetheless, may be subject to imposition of more stringent standards under federal common law, even though the complaining state itself does not comply with the asserted common-law standard. By analogy this same discrepancy in standard also would arise in cases involving air pollution, land use, safety and energy production.

The economic impact of the lower court's decision is equally significant. The courts below expanded the role of the judiciary in this area by effectively substituting their judgment for that of Congress, the states and local entities in determining both the priority of expenditures and the methods of abating a type of water pollution.

It is indeed paradoxical that even though during the course of the present litigation Congress detailed with considerable specificity the federal standards for water pollution control and

tightened enforcement procedures under these standards, the court below chose to ignore these developments and instead expand the body of federal common law in a manner that can only result in confusion and proliferation of litigation.

It is on the basis of an appreciation of these circumstances and the direct application of the precedent established with respect to the relationship of federal common law and statutory law in many other areas of current significant legislation that the *amicus* has developed an interest in the matter before the Court.

QUESTION PRESENTED

Although phrased in a variety of detail by petitioners, the central question may be framed in the terms and circumstances of the case as follows:

> *Where the occasional discharge of pathogens into local waters complies with the applicable federal and state statutes and regulations, does a neighboring State establish a claim of public nuisance under federal common law merely by showing that pathogens so discharged may sometimes reach its own waters and possibly infect its residents?*

ARGUMENT

1. The Court of Appeals Improperly Applied the Federal Common Law of Nuisance in the Context of a Comprehensive Federal Statutory and Regulatory Program for Water Pollution Control.

The capability of federal common law to resolve interstate environmental disputes is limited by an inability to contribute to the comprehensive planning essential for environmental control. As prophetically indicated in the Note, *Federal Common Law & Interstate Pollution,* 85 Harv. L. Rev. 1439 (1972), which pre-dated this Court's decision in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972):

> The inadequacy of case-by-case adjudication as a mode of considering all interests in setting environmental standards may be traced to two sources. First, the interests are too diverse and numerous to be represented in court *at the same time.* . . . Second, proper consideration of all environmental interests is beyond the courts' technical competence. . . . In view of these two limitations, courts will merely apply the analytical touchstones of the common law, such as reasonableness and fault on a case-by-case basis, without formulating them with the specificity and complexity requisite for comprehensive lawmaking in the environmental area. . . . 1453.

This is not to disclaim any role for federal common law when properly accommodated to the comprehensive federal statutory program to control water pollution under the FWPCA as amended. On the contrary, the two regimes can and obviously should complement one another. It is when the common law clashes with the statutory and regulatory program, however, that the need for an evaluation of the relationship between the two becomes imperative. The specter of costly and potentially stultifying confusion is raised by interference with the comprehensive legislative plan for water pollution control.

The interplay between federal common law and federal legislation surfaced early in the course of this litigation when this Court denied original jurisdiction. *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). Noting that an action might be filed in a district court based on "federal common law," this Court indicated that the limited federal legislation then extant had not supplanted the common law. 406 U.S. at 102. The decisions cited by this Court to illustrate the federal common law also did so in the absence of comprehensive federal legislation on the same matter.

For example, in *Hinderlider* v. *La Plata Co.,* 304 U.S. 92 (1937), two states disputed their rights in the water of an interstate stream. This Court decided the issue under federal common law because the interest of federalism precluded control by the law of either state. The decision, which occurred more than 10 years before enactment of the original Federal Water Pollution Control Act of 1948, never addressed the impact which a comprehensive federal statute on the same subject might have on related federal common law.

Similarly, *Texas* v. *Pankey,* 441 F.2d 236 (5th Cir. 1971) cited by this Court as stating the "controlling principle" of federal common law, limited application of the common law standard "until the field has been made the subject of comprehensive legislation or authorized administrative standards." *Id.* at 241-242. In *Illinois* v. *Milwaukee, supra,* this Court, quoting *Pankey,* carefully observed that there was no applicable federal statute as there is in the case now before the Court. 406 U.S. at 99-101.

While federal common law may not be completely preempted or eliminated by a comprehensive federal statute on the same subject, it nevertheless may not be applied to produce inconsistent standards. If the two regimes were permitted to clash, the inevitable effect would be to discourage the uniformity, finality and enforceability sought by Congress and to encourage clogging of the federal courts by those seeking to impose different standards.

The district court and the court of appeals misapplied this Court's simple acknowledgement of coexistent common law and statutory remedies as a mandate for development and expansion of federal common law in the face of a comprehensive congressional program to control water pollution.

As the court of appeals recognized, it is "appropriate to give weight to Congress' expectations in adopting the [Federal Water Pollution Control] Act and the standards established by EPA pursuant to the Act." *Illinois* v. *City of Milwaukee,* 599 F.2d 151 (7th Cir. 1979). How to weigh congressional intentions and to articulate them with applicable common-law principles is the question presented to this Court for decision. The answer may bear not only on cases of interstate water pollution, but on every controversy in which schemes of federal environmental legislation and regulation cut across fields of common law, such as land use, energy, safety and air pollution.

Noticing that common-law remedies are indeed preserved under FWPCA is only the beginning of the inquiry which this Court should undertake. A determination that the federal statute does not preempt existing law, state or federal, is not tantamount to a warrant for a court to ignore the statutory framework of water-pollution control when defining or remedying common-law nuisances in this field.

In reversing the order of the district court on effluent limitations, the court of appeals acknowledged that the statutory framework has common-law implications: the order was overruled because there was no evidence to justify imposing stricter limitations than those established by EPA. 599 F.2d at 176. Thus, without precluding equitable remedies outside its own elaborate procedures, the statute operates to caution the court against fashioning such relief in the absence of a particularized justification.

Yet the court of appeals effectively ignored the same statutory framework of regulation in affirming the district court's order on overflows of raw sewage: these were to be

totally eliminated even if they complied with EPA regulations and even though Illinois did not show that the occasional discharge of raw sewage created a substantially greater risk of harm to Illinois residents than did the regular discharge of treated sewage. *Id.* at 171.

The district court's frank confession of bewilderment in the face of conflicting expert testimony, Pet. Cert. App. F-3, 4, points up a larger conceptual problem with which this Court should come to grips: the proper function of the specialized knowledge of experts in deciding questions of common-law nuisance where agency expertise is already serving to inform a regulatory scheme based on federal statute.

This particular problem, which again has implications far beyond the regulatory scheme involved in this case, can be illuminated by considering the rationale supporting the doctrine of primary administrative jurisdiction, which speaks to an analogous concern. Recently, in holding that a proceeding under the Sherman Act should be stayed until an administrative agency considered whether a commodity exchange rule was valid under a regulatory statute, this Court reasoned that "determination [of facts] will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regimes." *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 307 (1973). The Court observed that the trial court would "be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits" if the agency first passed on the precise question within its jurisdiction. *Id.* at 307-308.

In *Ricci,* the precise reach of the Sherman Act's broad language was to be defined by the antitrust court in light of agency articulation of the narrower regulatory regime. In the case at bar, the court's understanding of the merits of the common-law claim would have been materially assisted by

EPA development of a factual record on the possible dangers of Milwaukee sewage to Illinois residents. Although Illinois invoked the enforcement procedures of the pre-1972 Act, it did not seek relief within the terms of FWPCA by requesting a veto or modification of the discharge permits. The trial court, therefore, had to adjudicate the claim without prior agency consideration of the specific factual question. Accordingly, in *Ricci* terms, the court was in a poorer position to make an informed judgment as to whether the common law should enjoin what the regulations apparently permit.

In the absence of agency findings on the very point at issue, a court should be reluctant to expand common-law rights or remedies in a field where common-law and regulatory regimes must be accommodated. Indeed, this Court might conclude that where a statutory scheme of water-pollution control is operating, the common-law judge should not disturb uncontested administrative decisions—like the decision to issue a permit to Milwaukee allowing occasional raw-sewage overflows into Lake Michigan—without a particularized showing of necessity. Such a conclusion would in no way abridge common-law rights in contravention of FWPCA section 505 (33 U.S.C. § 1365), but would place the burden of proof squarely on the plaintiff, where it belongs. *See, e.g., North Dakota* v. *Minnesota,* 263 U.S. 365 (1923). In particular, this would simply require application to a nuisance question of the court of appeals' reasoning on the effluent-limitation remedy.

The court of appeals also found that the correct standard of proof was a preponderance of evidence. 599 F.2d at 167. The question of the standard of proof in federal common-law nuisance actions where this Court does not have exclusive original jurisdiction has never been addressed directly by this Court, although where the defendant is a state the standard of clear and convincing evidence has been applied, *New York* v. *New Jersey,* 256 U.S. 296, 309 (1921); *Missouri* v. *Illinois,* 200 U.S. 496, 520-522 (1906). In a case where expert testimony is

in conflict and where hypotheses are stacked one upon another, the outcome may turn on the standard of proof. This Court should consider whether a plaintiff—state, political subdivision, or individual citizen—should be held to the same high standard of proof where the defendant is a political subdivision of another state. The court of appeals did not explain why the working of the federal system should require a different standard in the two cases.

While the standard of proof in interstate actions should comport with constitutional principles of federalism, the substantive issue in this case may hinge on the constitutional division of labor between the courts and Congress. In general, the legislatures, not the courts, have the power to find that any risk of harm, however small, is unacceptable. Legislative definition of a nuisance need only be rational. *See, e.g., United States* v. *Ashland Oil and Transportation Co.,* 504 F.2d 1317, 1323 (6th Cir. 1974); *cf. Reserve Mining Co.* v. *EPA,* 514 F.2d 492 (8th Cir. 1975); *Hadacheck* v. *City of Los Angeles,* 237 U.S. 394 (1915). But where a statutory framework of regulation tolerates certain risks of harm, the expansion of common-law remedies to protect against the same risks interferes with the efficient operation of the regulatory scheme, upsets reasonable expectations, and requires vast expenditures without any clear hope of significant improvements in public health or safety.

2. The Decision Below Is in Conflict With Applicable Decisions of this Court Under the Federal Common Law of Public Nuisance.

Quite apart from the existence of a regulatory regime, the decision of the court of appeals poses important questions of the burden and standard of proof in federal common-law nuisance claims. In an action between states, the question of proof must be approached with "great and serious caution." *Missouri* v.

Illinois, 200 U.S. at 520. The district court and court of appeals were considerably less than cautious both in assessing the legal sufficiency of the evidence and in fixing the standard of proof.

The court below rejected the standard of clear and convincing evidence, which invariably had been applied in interstate cases, and attempted to distinguish *New York* v. *New Jersey* and *Missouri* v. *Illinois* on the grounds that these were original actions in this Court, which coped with its unaccustomed role as factfinder by setting a high standard of proof. 599 F.2d at 167. This rationale, set forth as dictum in a later case where the defendant was a private party, *Ohio* v. *Wyandotte Chemical Corp.,* 401 U.S. 493, 501 (1971), played no role, however, in the interstate cases themselves, where the standard was chosen because of the quasi-sovereign status of the parties. Although the sovereignty rationale is not literally applicable to the case at bar, *cf. Illinois* v. *City of Milwaukee,* 406 U.S. 91, 98 (1972), the substantive issue in fact involves the desire of two states, Illinois and Michigan, to control the conduct of another, Wisconsin, which issued the discharge permits to Milwaukee, in a way in which they are unwilling to control themselves or their own political subdivisions. The views of a fourth state with a direct interest, Indiana, have not been presented. The rule this Court imposed on itself in *New York* v. *New Jersey* should apply at least as strictly to lower courts which adjudicate interstate claims. Before a court exercises the extraordinary power to control one state's conduct at the instance of another, the threatened invasion of rights must be "established by clear and convincing evidence." 256 U.S. at 309. This is especially true where, as here under FWPCA, Illinois, Michigan or any affected state could seek mandatory imposition of the asserted raw-sewage overflow standard with full benefits of regulatory agency expertise simply by adopting that standard for overflow discharges within its own borders. 33 U.S.C. § 1342.

The primary issue in this case, however, is whether liability for public nuisance was properly established at all. In holding that the evidence was sufficient to support a finding that "defendants' actions pose a significant risk of injury to Illinois residents," 599 F.2d at 167—a finding essential to proving a common-law public nuisance—the court pointed to the following facts: pathogens in Milwaukee sewage probably reach Illinois waters several times a year; these pathogens may infect drinking-water supplies if treatment plants malfunction, and possibly otherwise; the pathogens may infect swimmers who come directly into contact with them. (The court did not discuss the sufficiency of the evidence supporting the finding that Milwaukee's conduct "constituted a substantial contribution to the accelerated eutrophication" of the Illinois waters of Lake Michigan. *Id.* at 169.) This brief parade of possibles constituted, in the court's view, sufficient evidence of risk of harm. It was apparently for Milwaukee to show that its conduct did *not* significantly endanger Illinois residents. This novel allocation of the burden of proof is improper under the common law, with or without FWPCA.

In *New York* v. *New Jersey,* this Court required that the nuisance be "of serious magnitude." 256 U.S. at 309. That suit was dismissed because New York failed to prove that the proposed discharges into New York Harbor would cause an increased danger of disease to New York residents. *Id.* at 309-310. In an earlier case, Missouri's claim against Illinois had been dismissed when no connection was shown between the fact that typhoid bacilli from Chicago sewage discharges probably survived the journey to the St. Louis water intake and the increase in typhoid fever deaths in St. Louis. *Missouri* v. *Illinois,* 200 U.S. at 522-526. By applying the reasoning of the court of appeals to the *Missouri* case, a court could have found sufficient evidence of nuisance merely by noting that pathogens from Chicago likely arrived in Missouri and might infect its residents. But this Court, exercising caution, did not find a significant risk of injury in such a string of commonplaces.

The holding of *New York* v. *New Jersey* was followed expressly in *North Dakota* v. *Minnesota,* 263 U.S. at 374. Finding that the plaintiff failed to sustain its burden of proof, this Court went on to observe:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for outstanding facts from which the lay mind can safely draw inferences as to the probabilities." *Id.* at 385-386.

The court of appeals in the present case, rather than draw inferences as to the probabilities, either safely or rashly, apparently found it unnecessary seriously to consider probabilities at all. The parade of plausibles or possibles, expressly based on "less evidence than [Illinois] should have [produced]", Pet. Cert. App., F-10, satisfied the court's peculiar test of minimal probability and effectively shifted the burden of proof to the defendant. The approach taken by this Court has been consistently different, yet the court of appeals gave no reason for its radical departure from established principles of the federal common law of nuisance.

By contrast, in the court of appeals' reversal of the district court on the effluent limitation, we see not only a sound common-law argument, taking proper account of the relevant statutory framework, but a model of reasoning which the court of appeals ought to have applied to the overflow prohibition and to the primary question, that of liability itself.

After establishing liability on the basis of what is merely possible, the court reversed the district court's order in so far as it imposed an effluent limitation several times stricter than EPA's. The court reasoned that evidence must be given to

support the conclusion "that the relief granted is necessary to protect the complaining party from harm." 599 F.2d at 175. Although "general testimony" was offered that a stricter standard, measured in milligrams per liter, correlated with more effective chlorination, the evidence did not "show how much more effective chlorination would be a[t] 5 mg/l . . . than at 30 mg/l". *Id.* "[T]he difference may be significant or it may be *de minimis.*" *Id.* The question, in assessing the justification of the relief granted, was "whether significant benefits will result" from the higher standard. *Id.* The court noted that the evidence "consists merely of conclusions of [certain] experts and does not explain why the particular standards are necessary to protect the health of Illinois residents." *Id.* The district court's conclusion rested on "a speculative and uncertain basis." 599 F.2d at 176. Finally, the court of appeals looked to the EPA effluent limitations, holding in effect that a particularized justification was required for imposing stricter standards. Finding no justification in the record, the court did not sustain the order. *Id.*

The court of appeals' attempt to distinguish the overflow order from the effluent-limitation order is unpersuasive. The court baldly asserted that the probabilities of harm from raw sewage are significantly greater, though it is plain that the sort of particularized support the court required with respect to the effluent limitation was totally absent. 599 F.2d at 177.

The court also remarked that FWPCA itself "arguabl[y]" prohibits discharges of raw sewage. *Id.* Since Illinois sued only on a common-law theory, the intended force of this point must be to bolster the court's novel burden-shifting procedure by suggesting that it is consistent with congressional policy. We need not address the merits of the court's quite unprecedented construction of the statute, however, to argue that, while Congress or any legislature may prohibit conduct having a risk of harm without any showing of actual harm, an injunction will not issue from a court of law in nuisance cases simply as a

matter of course. *Harrisonville* v. *W. S. Dickey Clay Manufacturing Co.*, 289 U.S. 334 (1933). Generally, "if the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld." *Parker* v. *Winnipiseogee Lake Cotton and Woollen Co.*, 67 U.S. (2 Black) 545, 553 (1863) (dictum).

Congressional intent would not be honored by expansion of common-law remedies for water pollution. The difference between legislative and judicial proscription is not merely a difference in degree. When the two regimes clash, as they have under the decisions below, the common law must be informed by the statutory program and accommodated thereto so that all parties may avoid the price of uncertainty in trying to conform to the requirements of the law.

CONCLUSION

For the aforegoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed to the extent that it affirmed the judgment of the district court with respect to the elimination of overflows and affirmed to the extent that it reversed the judgment of the district court with respect to effluent limitations.

Respectfully submitted,

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